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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-4901

WILFORD HARRISON BURCH, SR.,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI

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IN THE

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OCTOBER TERM, 1971

No.

WILFORD HARRISON BURCH, SR.,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPEME COURT OF THE STATE OF NEW JERSEY

Petitioner, Wilford Harrison Burch, Sr., prays that a writ of certiorari issue to review the judgment of the Supreme Court of New Jersey, entered July 7, 1971, denying his petition for certification, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The decision of the Supreme Court of New Jersey is not yet reported, the same being an order denying petitioner's petition for certification.

An opinion of the Superior Court of New Jersey, Appellate Division, affirming the defendant's conviction is not yet reported.

JURISDICTION

The Order of the Supreme Court of New Jersey denying certification was entered on July 7, 1971. This Court has jurisdiction under 28 U.S.C.A. § 1257(3).

QUESTIONS PRESENTED

1. Whether the search of petitioner's automobile by a police officer who observed no motor vehicle violation or other crime, as well as subsequent searches of petitioner's home which were based upon information received in the original search, constituted violations of his rights under the Fourth and Fourteenth Amendments to the Constitution of the United States.

2. Whether error was committed by the trial court in charging the jury by reading the entire "receiving stolen property statute" and thus placing the burden of proof upon the petitioner to explain his possession of stolen articles, and whether such error was in violation of the Fourteenth Amendment.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but uopn probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .

N.J.S. 2A:139-1. Buying or receiving stolen property; harboring thief; possession as sufficient evidence to convict, except in certain cases.

Any person who receives or buys any goods or chattels, or chooses in action, or other thing of value stolen from any other person or taken from him by robbery or otherwise unlawfully or fraudulently obtained, or converted contrary to law, whether the stealing or robbery was committed either in or out of this State, and whether the property was received or bought from the thief or robber, or from another person, or who receives, harbors

or conceals any thief or robber knowing him to be so, is guilty of a high misdemeanor.

Possession of such property within 1 year from the date of such stealing, robbery or unlawful or fraudulent obtaining, shall be deemed sufficient evidence to authorize conviction, unless the accused show to the satisfaction of the jury either:

a. That the property, considering the relations of the parties thereto and the circumstances thereof, was a gift to him and not received by him from a minor under the age of 16 years; or

b. That the amount paid by him for the property represented its fair and reasonable value and that it was not received by him from a minor under the age of 16 years; or

c. That when he bought the property he knew or made inquiries sufficient to satisfy a reasonable man, that the seller was in a regular and established business for dealing in property or the description of the property purchased; or

d. That when he received or bought the property, he simultaneously with or before the receipt or sale, reported the transaction to the police authorities of the municipality in which he resided at the time of such receiving or buying and that the property was not received by him from a minor under the age of 16 years; or

e. That before he received or bought the property from a minor under the age of 16 years, he first communicated with the police authorities of the municipality in which he resided and obtained their approval for the purchase, barter, exchange or receipt of possession thereof.

N.J.S. 24:18-4. Unlawful manufacture, possession, sale, etc.

It shall be unlawful for any person to manufacture, possess, have under his control, sell, prescribe, administer, dispense or compound any narcotic drug, except as authorized by this chapter.

STATEMENT OF THE CASE

A. *Procedure*

Petitioner was indicted by the Bergen County Grand Jury for one count of possession of a narcotic drug in violation of *N.J.S.* 24:18-4 and four counts of possession of stolen property in violation of *N.J.S.* 2A:139-1. Petitioner was tried for all of these counts on April 9, 1970 in the Bergen County Court with a jury. One count of possession of stolen property was dismissed and he was convicted of all remaining counts. Defendant was sentenced to serve 8 to 10 years in the New Jersey State Prison for the violation of *N.J.S.* 24:18-4. He was further given three to five years concurrent sentences on each count in violation of *N.J.S.* 2A:139-1.

Prior to trial, the defendant had moved, pursuant to the New Jersey Court Rule, to suppress the evidence against him on the grounds of an illegal search and seizure. This motion was denied by the trial court. Defendant then moved for leave to appeal this decision to the Appellate Division, which motion was denied since the application was moot. (Defendant had already been tried and convicted and had a remedy for denial of his motion by direct appeal as of right.)

On appeal, the Appellate Division affirmed the conviction of defendant and a Petition for Certification to the Supreme Court of New Jersey was denied. Copies of the opinion of the Appellate Division and Order of the Supreme Court are annexed hereto.

B. *Facts Pertaining to the Searches*

At approximately 11:30 A.M., on October 29, 1969, Trooper Robert Beh of the New Jersey State Police was on routine patrol duty in Teaneck on Rte. #95 (also known as Rte. #80 in that area). At this time, he observed a 1970 Cadillac operated by the defendant proceeding southbound in the local lanes of the highway. The Trooper observed a pink sticker on the right hand portion of the windshield which indicated that there was a fourteen-day period in which the vehicle was supposed to have been inspected. Trooper Beh motioned the defendant to pull over to the shoulder of the road and pulled his police car behind the Cadillac. He had not observed any violations of the traffic laws on the part of the defendant and his only reason for stopping him was to inspect the sticker and check his license and registration. Trooper Beh did not remember whether or not he was operating an unmarked car. Upon stopping the defendant's vehicle, he walked around the car and looked at the pink sticker. He did not recall whether or not the sticker showed that the vehicle was overdue for inspection. Nor did he recall whether he issued a traffic summons for the failure to have the vehicle inspected.

Trooper Beh asked to see the defendant's license and registration, but did not recall whether or not the defendant produced his license. Indeed, before the Grand Jury, Trooper Beh stated that the defendant, upon being asked

for his license and registration, produced his license but failed to have his registration with him. At trial, he stated that the defendant did not have his license.

Trooper Beh testified that in response to a question concerning the license and registration, defendant stated that "he did not have his driver's license in his possession at that particular time, but the registration might be in the trunk of the vehicle." Thereupon, according to Trooper Beh, the defendant got out of the vehicle, walked to the rear, and opened his trunk. As soon as the defendant opened the trunk, the officer observed "four cellophane bags containing a white powdery substance". Trooper Beh could not recall what other specific items were in the trunk. Upon observing the cellophane bags, he asked the defendant what was in them. The defendant replied it was for his kid. The defendant was then placed under arrest for possession of narcotics.

Trooper Beh did not recall if the trunk was opened with an automatic device from the glove compartment, but stated that the defendant voluntarily opened the trunk of the automobile to look for his registration, at which point he observed narcotics in plain view.

Upon the opening of the trunk of the 1970 Cadillac, Trooper Beh observed 4 large cellophane bags containing a white powdery substance. The bags had a combined weight of 520 grams of heroin and 920 grams of cocaine. The state proved that the car was owned by the defendant's wife and that it was the defendant who suggested they look in the trunk.

After arrest of the defendant, a second Cadillac pulled up at the scene and the driver identified himself to Trooper Beh as being the son of the defendant. Trooper Beh also placed the son under arrest.

The subsequent search of Petitioner's home was based upon a warrant. The affidavit for the warrant gave as substantive grounds for the search only that Petitioner had just been arrested with large quantities of heroin and cocaine in his automobile and that the officer, a narcotics expert, felt that such a quantity meant Petitioner was a wholesaler of narcotics and maintained a place to process the drugs.

No narcotics or narcotics related paraphernalia were found on the premises.

While executing the search warrant, the police observed some 500 watches contained in a cardboard carton which they seized. Actually, the precise number was 521 watch movements. At the time of that seizure, the police noted several business machines and wrote down the serial numbers and any other identifying features. After learning the probability that the items were stolen, a second search warrant was issued for the seize of these items. The seizure of these items and the watches resulted in separate counts charging the defendant with possession of stolen property.

C. *The Court's Charge to the Jury*

At the outset of his charge, the trial judge advised the jury that the law with respect to the receiving of stolen property was "as follows". He then proceeded to read the entire receiving statute, *N.J.S.* 2A:139-1, to the jury. This statute permits an inference of knowledge of possession, an element of the offense, by virtue of an unxplained possession within one year after the theft. The defendant thus had the burden of establishing his innocence of the charge by explaining his possession. This result was reinforced by the trial court when it subsequently charged

that the inference of guilt allowed by statute was sufficient to justify a conviction unless the "defendant overcomes the inference of guilt thus raised by showing to the satisfaction of the jury any reasonable explanation xxx."

D. *Statement of Federal Questions*

The issue of an illegal search and seizure was raised prior to trial by a motion to suppress. This motion was denied, as was the motion for interlocutory leave to appeal. The latter motion was denied on the ground that since the trial had been completed, the issue was moot and defendant had an automatic right to review of all issues on appeal.

The issue with regard to the charge of the trial court was raised by exception in that defense counsel argued that the statutory "presumption" of guilty knowledge did not apply to at least one of the articles allegedly possessed more than a year after the same was stolen. The Appellate Division stated that this objection was ill-founded and that defendant had not raised the issue at the trial level. The court did however consider the issue. The Appellate Division agreed that the charge was contrary to the directions of the applicable New Jersey case (*State v. Di Rienzo*, 53 N.J. 360 (1969)). Further it was held that the trial court's language which implied that it was incumbent upon the defendant to establish to the satisfaction of the jury, any "reasonable explanation" of his possession to overcome the "inference of guilt" arising from recent possession was erroneous. (See Opinion of Appellate Division annexed hereto.)

Nevertheless, the Appellate Division again found no "plain error" as against what it termed the "fanciful explanation" for the defendant's possession by him, as testi-

fied to by his wife. The court stated that the jury's decision was based not upon the court's charge, but upon the incredibility of the tendered explanation.

The Appellate Division also found without merit all of defendant's other contentions, including his argument pertaining to the legality of the searches and seizures. (See Opinion of Appellate Division annexed hereto.)

Petition for Certification to the Supreme Court of New Jersey was denied on June 7, 1971. The Order of denial is annexed hereto.

REASONS FOR GRANTING THE WRIT

Under the facts heretofore set forth, it is respectfully submitted that the search in question violated Petitioner's rights under the Fourth Amendment. The State of New Jersey argues in large part that the search is justified by virtue of the New Jersey statute authorizing Police officers to inquire of motorists for their license and registration and, absent proper registration, or proof of ownership, to arrest the defendant. *N.J.S.* 39:5-25. This is construed to allow a search of the vehicle for proof of ownership.

Assuming the foregoing to be a correct interpretation of the law, the Supreme Court case of *Sibron v. New York*, 392 U.S. 40, 88 S. Ct. 1889 —— L.Ed.2d —— (1968) has nevertheless stated that while a state may make its own search and seizure law to meet the needs of local law enforcement and may call the standards it employs by any name it chooses, it may not authorize police conduct which trenches upon Fourth Amendment rights, regardless of such labels. The search may therefore be unreasonable under the Fourth Amendment although authorized by state law.

It is respectfully submitted that the facts of *Sibron v. New York, supra,* (the search of an individual for narcotics after seeing him converse at length with known narcotics users) are analogous to those of the case at hand to such an extent as to place the conviction of Petitioner in direct conflict with that case, thus requiring certification to this court for correction.

Further, the case of *Chambers v. Maroney,* 399 U.S. 42, 90 S.Ct. 1970 —— L.Ed.2d —— (1970) dealt specifically with the search of a motor vehicle. It was stated therein that automobiles may be searched without a warrant under circumstances which would not justify the search of a house. It was nevertheless held that probable cause is the minimum requirement for a reasonable search under the Constitution. See also *Dyke v. Taylor Implement Mfg. Co.,* 391 U.S. 216, 88 S. Ct. 1472, 20 L. Ed. 2d 538 (1968) expressly finding no probable cause to search an automobile.

It is respectfully submitted that there is no probable cause to believe any crime or offense had been committed in the case at hand. The officer could not even recall if the vehicle was overdue for inspection. The applicable New Jersey cases, while seeming to indicate that a search may be undertaken merely to obtain proof of ownership, nevertheless deal with factual situations involving evidence at least of motor vehicle violations and often, more serious offenses. See e.g. *State v. Hock,* 54 N.J. 526 (1969); *State v. Campbell,* 53 N.J. 230 (1969); *State v. Boykins,* 50 N.J. 73 (1967); *State v. Cusick,* 110 N.J. Super. 149 (App. Div. 1970); *State v. Braston,* 93 N.J.L.J. 885 (1970).

The primary issue thus appears to be whether or not the police officers may search a vehicle merely in search of proof of ownership where there is no probable cause to

believe an offense or crime has been committed. It is respectfully submitted that the United States Supreme Court cases heretofore cited indicate that such a search is unreasonable.

While the State of New Jersey also argues that the search was consented to, and Fourth Amendment rights therefore waived, it is suggested that this approach is not merited by the facts since nowhere does it appear that the Petitioner invited a search or consented to a search, merely that he was searching for the registration himself. To be voluntary, the consent must unequivocal and specific and freely and intelligently given. *Judd v. United States*, 89 U.S. App. D.C. 64, 190 F.2d 649 (D.C. Cir. 1951). A strong factor indicating lack of such consent is the fact that the search resulted in seizure of contraband which the accused must have known would be discovered. See *Higgins v. United States*, 93 U.S. App. D. C. 340, 209 F.2d 819 (D. C. Cir. 1954).

For the foregoing reasons, it is respectfully submitted that the search in question resulted in a denial of Petitioner's Fourth Amendment rights and review of the decision below therefore is sought for proper relief.

THE COURT'S CHARGE

Petitioner is not here attacking the constitutionality of any New Jersey statute. Rather he is claiming denial of due process in the application of the statute to him. The New Jersey Supreme Court has laid down guidelines for the offense of receiving stolen property and expressed the dangers of reading the statute because of its language concerning the permissible inferences from possession. *State v. Di Rienzo*, 53 N.J. 382 (1969). The Appellate Di-

vision found that the trial court's charge in the case at hand was contrary to the directions in *Di Rienzo*. It nevertheless found no "plain error".

Emphasis is here made by the Petitioner on the statements of the trial court in his charge which exaggerated the effect of the statute and, in effect, required the defendant alone to testify to prove his innocence. Specifically, the trial court stated it was incumbent upon the defendant to establish to the satisfaction of the jury any "reasonable explanation" of his possession to "overcome the inference of guilt arising from recent possession. The Appellate Division again agreed that this was error, but not reversible in view of the "fanciful explanation" offered by the defendant for his possession.

It is respectfully submitted that the obvious effect of the language of the court was to place the burden upon defendant to prove his innocence, a situation not contemplated even under the statute. The Appellate Division, in effect, was speculating on the jury's reasoning in order to find the error not reversible.

It is further submitted that this placing of the burden of proving innocence on the defendant is a violation of due process. See *Morrison v. California*, 291 U.S. 82, 78 L.Ed. 664, 54 S. Ct. 281 in which case the presumption arose by stattue.

Further, the effect of the language noted was to advise the jury that it was incumbent upon the defendant to testify. The jury could thus easily determine that failure of the defendant to testify was evidence of his guilt. See *Fontaine v. California*, 390 U.S. 593, 88 S. Ct. 1229, 20 L.Ed.2d 154; *Griffin v. California*, 380 U.S. 609, 15 L.Ed. 2d 106, 85 S. Ct. 1229.

CONCLUSION

It is thus respectfully submitted that the charge to the jury prejudiced Petitioner's right to a fair trial and denied him due process, requiring review by this court.

Respectfully submitted,

/s/ John K. Walsh
JOHN K. WALSH
WALSH & SIEGEL
Attorneys for Petitioner

APPENDIX "A"

IN THE

SUPREME COURT OF NEW JERSEY

C-527 SEPTEMBER TERM, 1970

STATE OF NEW JERSEY,
Plaintiff-Respondent,

vs.

WILFORD HARRISON BURCH, SR.,
Defendant-Petitioner.

Order Denying Petition for Certification
(Filed July 7, 1971)

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied, with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 7th day of July, 1971.

/s/ Irving B. Zeichner
Acting Clerk of the Supreme Court

APPENDIX "B"

Opinion of the Supreme Court of New Jersey
(Filed May 12, 1971)

Argued April 26, 1971—Decided

Before Judges Conford, Kolovsky and Carton

On appeal from Bergen County Court

Mr. John K. Walsh argued the cause for appellant (Mr. Carlos Peay, Jr., attorney)

Mr. Anthony J. Pace, Assistant Prosecutor, argued the cause for respondent (Mr. Robert Dilts, Bergen County Prosecutor, attorney)

The opinion of the court was delivered by

CONFORD, P.J.A.D.

We have examined and find without merit defendant's contentions: that the evidence adduced at trial was the product of unlawful search and seizure; that the verdict was against the weight of evidence on either the charge of possession of narcotics or those of receiving stolen property; that there should have been an acquittal on defendant's motion on the charge of possession of narcotics; and that there was improper joinder of unconnected charges (the latter urged as plain error).

As to the latter point, defendant's failure to have objected to the joint trial of the charges requires "a strong showing of probable prejudice in fact to warrant a finding of 'plain error'." *State v. Baker*, 49 N.J. 103, 105 (1967), cert. den. 389 U.S. 868 (1967). We fail to perceive such a showing here.

There was no objection by defendant at trial to the Court's instruction to the jury on the charges of receiving stolen property except to argue that the so-called statutory "presumption" of guilty knowledge (mentioned by the court—but not as a "presumption") did not apply in reference to one of the items—a typewriter—that having been stolen more than a year prior to defendant's possession. The defendant's objection was ill-founded. Proof offered on defendant's behalf showed possession by him of that article less than a year after the theft. Defendant argues for the first time on appeal that the charge was contrary to expressions of the Supreme Court in *State v. DiRienzo*, 53 N.J. 360 (1969), particularly in respect of the danger that reading and commenting on the receiving statute in the charge to the jury may have the effect of reversing the State's burden of proof of all the elements of the crime and of imposing a burden of justification of innocent possession on the defendant once the State shows possession by defendant within a year of the theft.

We agree that the charge on receiving was contrary to the directions of *DiRienzo*, particularly the caveat therein against reading to the jury that portion of the statute dealing with permissible inferences from the fact of possession within a year of the theft. 53 N.J., at 382. Moreover, the incorporation in the charge of language implying that it was incumbent upon the defendant to establish to the satisfaction of the jury any "reasonable explanation" of his possession to "overcome the inference of guilt" arising from recent possession, was erroneous. However, the court did at one disconnected point of the charge instruct the jury that it was incumbent upon them in order to convict to find defendant guilty beyond a reasonable doubt of all the elements of the crime, including the element of knowledge that the goods were stolen.

Notwithstanding the shortcomings of the charge aforesaid we do not conclude that they amounted to plain error as against the fanciful explanation for defendant's possession of the stolen typewriter, calculator and dictaphone submitted on his behalf by his wife. This was that these obviously costly articles, which were not ordinary household equipment, were abandoned by a tenant in a rooming house operated by defendant and his wife in New York after running up arrears on his rent bill, and that they removed the articles to their home in New Jersey merely to clear the room for rerental, never hearing from the tenant again. We are satisfied that the jury's findings of the defendant's guilt on the receiving charges were not influenced by the nature of the court's charge on burden of proof but rather upon the incredibility of the tendered explanation for his possession of the articles.

Affirmed.

A TRUE COPY

/s/ Mortimer G. Newman, Jr.
Clerk